



EXITING THE EU – THE DIE IS CAST

On Wednesday 29 March 2017 the UK Prime Minister, Theresa May, gave notice under Article 50 of the Treaty on European Union (TEU) ("Article 50") of the UK's intention to leave the EU. This means, almost certainly, that two years from now the UK will leave the European Union, some 46 years after becoming a Member State of the then "European Common Market" on 1st January 1973.

This is a decision of huge economic and political significance following the June 2016 Referendum in which voters in the UK by 52% to 48% voted to leave the EU. The impact on the future of the UK and of the rest of the EU cannot yet be known, and the notice is given early in a year of very significant political upheaval:

- at least three of the original six Member States (Netherlands, France and Germany) have general elections;
- the EU as a whole continues to face difficulties in dealing with the inflow of refugees and economic migrants from the Middle East and North Africa;
- Greece and some other countries struggle with their participation in the Euro-zone;
- there is a background of continued war in Syria and Iraq; and
- there is a new US administration with radical policies.

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Opening positions

The UK

Extracts from the Article 50 letter delivered to the President of the European Council on 29 March 2017:

"The United Kingdom wants to agree with the European Union a deep and special partnership that takes in both economic and security cooperation. To achieve this, we believe it is necessary to agree the terms of our future partnership alongside those of our withdrawal from the EU".

"We should always put our citizens first...and we should aim to strike an early agreement about their rights".

"In security terms a failure to reach agreement would mean our co-operation in the fight against crime and terrorism would be weakened".

"We will need to discuss how we determine a fair settlement of the UK's rights and obligations as a departing Member State, in accordance with the law and in the spirit of the United Kingdom's continued partnership with the EU. But we believe it is necessary to agree the terms of our future partnership alongside those of our withdrawal from the EU".

"In order to avoid any cliff-edge as we move from our current relationship to our future partnership, people and businesses in both the UK and the EU would benefit from implementation periods to adjust in a smooth and orderly way to new arrangements".

"In particular, we must pay attention to the UK's unique relationship with the Republic of Ireland and the importance of the peace process in Northern Ireland".

The EU

The European Council's draft negotiation guidelines published on 31st March 2017:

Phased approach to negotiations:

- The main purpose of the negotiations will be to ensure the UK's orderly withdrawal
- An overall understanding on the framework for the future relationship could be identified during a second phase of the negotiations

Agreement on arrangements for an orderly withdrawal:

- Agreeing reciprocal guarantees to settle the status and situations at the date of withdrawal of EU and UK citizens
- Impact on businesses – prevent legal vacuum and address uncertainties once the Treaties cease to apply to the UK
- A single financial settlement covering all legal and budgetary commitments as well as liabilities including contingent liabilities
- In respect of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order
- UK must honour its share of international commitments contracted in the context of its EU membership
- Arrangements for the future locations of the seats of the EU agencies and facilities located in the UK
- Arrangements ensuring legal certainty for all court procedures pending before the CJEU on the date of withdrawal that involve the UK or natural or legal persons in the UK. The CJEU should remain competent to adjudicate in these procedures
- Dispute settlement mechanisms and role of CJEU

Preliminary and preparatory discussions on a framework for an EU-UK future relationship

- Any free trade agreement should be balanced, ambitious and wide-ranging. It must ensure a level playing field in terms of competition and state aid, and safeguards against unfair competitive advantages through fiscal, social and environmental dumping
- No agreement between the EU and the UK may apply to the territory of Gibraltar without the agreement between the Kingdom of Spain and the United Kingdom

At EU Commission level, Michel Barnier, Chief Negotiator for the EU, set out his key priorities in a speech on 22 March 2017 to the European Committee of the Regions, which also advocate a phased approach to the two sets of negotiations and an early agreement on citizen's rights and on the financial settlement. The European Parliament will be debating a draft motion for a Resolution on its requirements for a Brexit deal on 5 April 2017.

What happens next?

The negotiating process will slowly get under way and will primarily relate to the arrangements for the UK to leave the EU in 2019, although Article 50 requires any leaving agreement to take account "of the framework for [the leaving Member State's] future relationship with the European Union."

Although the date of serving notice to the European Council triggers the two year period provided for concluding a withdrawal agreement, it may take some time before the negotiations can start, as we explain below. The actual time available for substantive negotiations is likely to be not more than a year and possibly less.

The extent of discussions on a future trading relationship and their timing will depend on what the parties agree.

There is a significant risk that the process will not lead to any agreement at all, in which case the relationship between the UK and the EU after 2019 will be aligned with that of fellow members of the World Trade Organisation (WTO) and other international bodies.

The negotiations will also relate to the UK's withdrawal from the European Atomic Energy Community, which is also referred to in the Article 50 letter.

THE MAIN ACTORS

THE EU	THE UK
Donald Tusk President of the European Council, former Prime Minister of Poland	Theresa May Prime Minister, former Home Secretary
Michel Barnier, the Chief Negotiator in charge of the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50, former French Minister for Foreign Affairs and EU Commissioner for the Internal Market and Services	David Davis Secretary of State for Exiting the EU, Head of the Department for Exiting the EU (DexEU)
Jean-Claude Juncker President of the European Commission, former Prime Minister of Luxembourg	David Jones, Minister of State at DEXEU and Member of Parliament Lord Bridges of Headley MBE, and Robin Walker MP, Parliamentary Under Secretaries of State, DexEU
Didier Seeuws, a Belgian diplomat and currently Director at the Secretariat of the Council, appointed to head a special Brexit task force within the Council	Oliver Robbins, Permanent Secretary for the Department for Exiting the European Union.
Guy Verhofstadt, the European Parliament's lead negotiator on Brexit, former Belgian Prime Minister and current leader of the Alliance of Liberals and Democrats for Europe in the European Parliament	Hilary Benn, Chair of the Select Committee for exiting the European Union, responsible for leading UK Parliamentary scrutiny, and Member of Parliament

The Article 50 Process

The Brexit leaving negotiations will be governed by Article 50 TEU and Article 218(3) TFEU, which sets out the rules for EU negotiations on international agreements with third countries. The procedural arrangements for the negotiations on the EU side were agreed at a meeting of the Heads of State or Government of the remaining 27 Member States (the EU 27) and the Presidents of the European Council and the European Commission, in Brussels on 15 December 2016.

The first step is for the notice to be considered by the European Council (meeting without the UK), and for it to agree, by consensus, on a set of guidelines for the EU negotiating team. The guidelines will set out the overall positions and principles the EU will pursue throughout the negotiation.

Based on these guidelines the EU Commission will draft a detailed "mandate" for the negotiations which it will submit to the Council of the European Union (the Council) for authorisation to start the negotiations. The Council for this purpose is made up of the European Affairs Ministers of the EU 27 and, in this form is known as the General Affairs Council. The Council will adopt more detailed negotiating directives on the substance of the proposed agreement such as the nature and scope of the agreement, general principles and objectives. Both the European Council guidelines and the Council negotiating directives will be updated in the course of the negotiations as necessary. These are likely to be confidential documents initially, but may later be published.

The EU Commission will conduct the negotiations under the supervision of the EU 27.

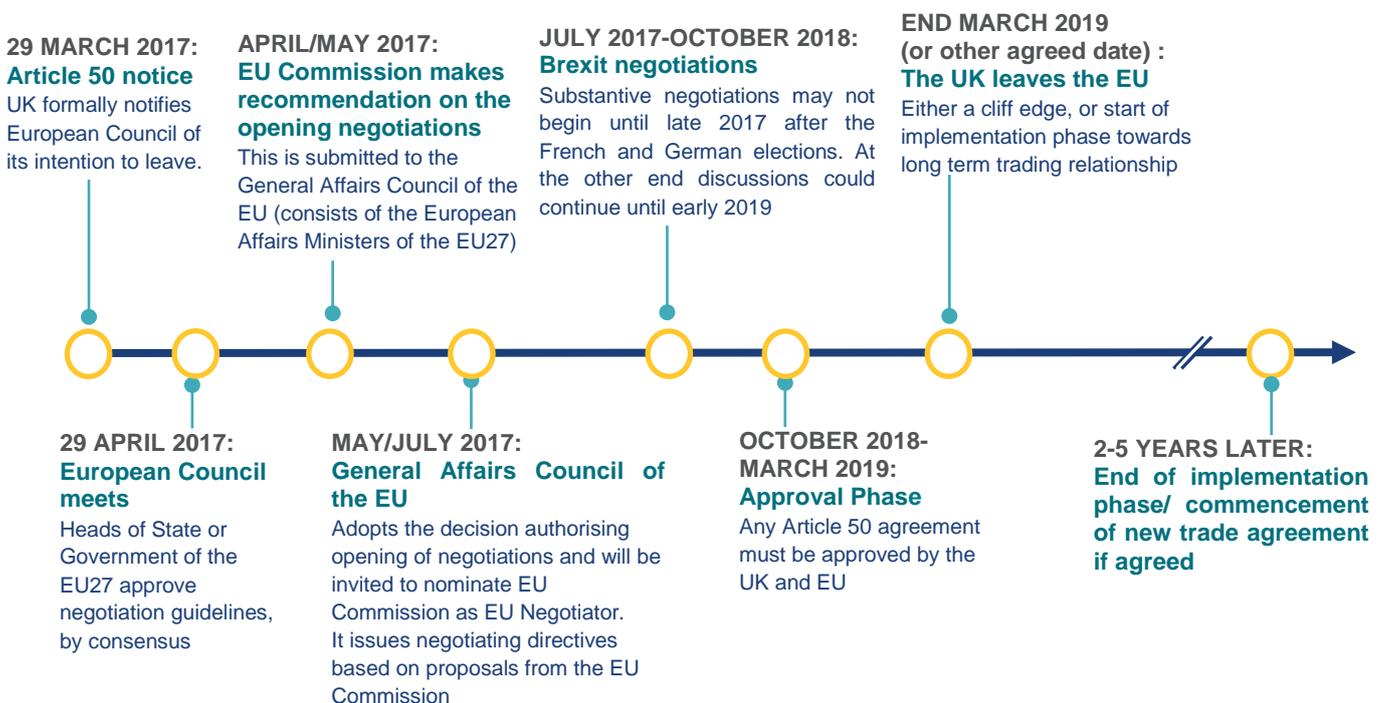
- Negotiations must be conducted in line with the European Council guidelines and the Council's negotiating directives. The General Affairs Council, assisted by its special task force, will ensure that this is the case and will also provide guidance to the negotiator;
- Representatives of the President of the European Council will be present and participate in all negotiation sessions;
- The EU negotiator will be invited to keep the European Parliament closely and regularly informed throughout the negotiations, but the Parliament's representative can only attend by invitation.

The negotiations must be timed so as to allow for approval processes for the agreement the parties hope to reach. While it would be sensible to start these processes in early autumn 2018, it may be that the negotiations will go on till the last possible moment.

The parties may extend the period for negotiation and continued membership of the EU by agreement, which, on the EU side requires the unanimous approval of the European Council.

If a withdrawal agreement is reached and approved the UK will exit the EU either on 29 March 2019 or such other date as is specified in the agreement, but the negotiations could end without any agreement at all, in which case the UK will be out of the EU on 30 March 2019.

If there is common ground on the framework for a new relationship this is likely to be drawn into the withdrawal agreement or agreed in some other form at the same time.



Course of Negotiations

It is clear from the UK's White Paper on Brexit (see our [Legal Guide](#)) that continued membership of the single market or of the EU customs union will not be sought by the UK. The UK will, however look for a close and positive relationship with the EU post-Brexit.

Negotiations in the early stages look likely to be more about what is to be negotiated and in what order:

- **Financial contribution from the UK** The Commission appears to wish to settle at the outset the principles on which the UK will contribute to the EU's ongoing budgeted commitments made while the UK is a Member State, but the UK House of Lords have indicated that, while there is room for argument, their preferred view under international law is that the UK will have no liability to meet budget obligations payable after it has left the EU. The UK may take a pragmatic view of its ultimate willingness to make a contribution depending on the overall deal in relation to the period during which these payments are due, but this tussle seems likely to take some time.
- **Framework for new Trade Agreement** The UK wishes to negotiate the framework of a new trade agreement or agreements with the EU alongside agreeing the terms of leaving and an "implementation phase" designed to ensure a smooth transition to a new relationship. The wording of Article 50 supports the view that the terms of a leaving agreement should take account of the proposed new relationship between the EU and the leaving State, but Michel Barnier suggested this cannot be considered at all until the leaving arrangements are settled. Reaching an agreement on this issue will be essential to moving forward with the negotiation.
- **Rights of EU Citizens** When the European Union (Notification of Withdrawal) Act 2017 (which gave the UK Government parliamentary authority to serve the withdrawal notice) was going through the UK Parliament, the House of Lords inserted an amendment requiring the Government to guarantee the rights of EU citizens currently living in the UK after Brexit. Although this amendment was overturned later in the passage of the legislation, both the UK and the EU, as well as many of the EU 27 Member States, have expressed the desire to settle the future of those already exercising their right of free movement as early as possible in the process. This may be one of the first areas of agreement.
- **Risks of delay in Process** It seems likely that these issues of principle will take up a considerable period in which serious negotiations on the substance of the arrangements will not take place. This may take most of the rest of 2017 for two reasons:
 - First, because the resolution of these points will itself be complex;
 - Second, because with general elections in key Members States, particularly France and Germany, the policy of these key directing minds in the negotiations is unlikely to become clear until a new German government has been formed, some weeks after their September elections.
- **EU Political Risk** There is a risk that changes in the continuing EU, particularly the Eurozone, could divert attention from the negotiations. The risks include the election of a right-wing Eurosceptic government in France, which might not be committed to remaining in the Eurozone, or, possibly, in the EU; a crisis in the Eurozone, most likely related to the economy of Greece or possibly other Member States; and a crisis related to the inflow of asylum seekers and the fragile military situation in the Middle East over the summer months.
- **UK Political Risk** The UK Government has a relatively small majority and this could lead to difficulties in parliamentary management or an early general election. We discuss the impact of the decision of the Scottish Government to seek an early referendum on withdrawal from the UK below. Finally there are risks of rising tensions in Northern Ireland arising from the Brexit decision. However, none of these matters will make any difference to the process or timetable for the UK leaving the EU, unless the outcome – eg of a general election – were to radically change the UK negotiating stance, so that it sought for example continued membership of the Single Market through a treaty relationship with the EU or even to withdraw the notice altogether.

CAN THE ARTICLE 50 NOTICE BE WITHDRAWN?

It is not clear whether, once the notice is given, the UK would be able to withdraw its notification. The Government and the claimants in the Miller case (in which the Supreme Court held that parliamentary authority was necessary under the UK constitution for the notice to be served [see here](#)) agreed that the notice was not revocable. However, Article 50 itself is silent on the issue and arguments can be made for either view. Article 68 of the Vienna Convention on the Law of Treaties for example provides that a notification or instrument dealing with withdrawal or termination may be revoked at any time before it takes effect, but this may not be applicable to the TEU. Others rely on Article 50(5) TEU which considers the possibility of reapplying for membership in order to support the opposite view, although the provision

refers to a State which "has withdrawn" suggesting it applies after completion of the withdrawal process has occurred. Should the issue become material, it will ultimately be up to the Court of Justice of the EU (CJEU) to determine the correct interpretation of Article 50.

Financial obligations of a leaving State - What is the UK obliged to pay?

The UK is the second largest contributor to the EU budget after Germany and takes out of the budget each year substantially less than it pays in. The loss of these payments thus have significant financial consequences for the EU 27.

There is no doubt that the UK has to continue to make budget contributions until it actually leaves the EU.

The argument is around whether the UK is obliged, even after it has left the EU, to pay towards budget lines of expenditure agreed before the UK left, or to make other payments as a result of leaving.

ARTICLE 70 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES, ENTITLED "CONSEQUENCES OF THE TERMINATION OF A TREATY" PROVIDES:

Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

- a. releases the parties from any obligation further to perform the treaty;
- b. does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Arguably, this means that after Brexit the UK will have none of the obligations that come with membership. However, it may be considered to still be responsible for other obligations that it has undertaken in connection with the EU.

Thus, on the one hand, commitments to pay budget contributions could be considered to cease on Brexit but, on the other hand, some of the commitments towards third countries, for example under the European Development Fund, that are outside of the budget but are managed by the EU, would remain. Another example is contingent liability of the UK arising out of the guarantee of the UK to the bail-out of Ireland. Of particular interest, in view of its nature and size, is the commitment of Member States to guarantee the payment of pensions of EU officials contained in Article 83 of the EU Staff Regulations.

The law is not clear and nor is the means by which any financial obligation could be adjudicated and enforced. The matter is likely to be resolved by negotiation and the extent to which the UK continues to benefit from EU funded programmes (eg structural funds and funds for scientific research) and participates in EU programmes following Brexit is likely to play a significant role in the outcome.

Finally there are questions whether the UK's interest in the EU's assets should be taken into account and whether its interests in the European Investment Bank should be repaid.

What happens at the end of the negotiations?

Assuming that negotiations do not break down, then a draft withdrawal agreement under Article 50 (which may also include agreement for an implementing phase) will be agreed by the negotiators. This will require a number of approvals, which means that negotiations should be concluded six months or so before the leaving date to allow for these approvals to be given and an orderly approach to the changes (eg introduction of customs checks) at the withdrawal date. However, talks may go on much longer making the approval processes very rushed.

The UK The UK Government has indicated that its Parliament will have a "take it or leave it" vote on the draft agreement before the EU Parliament considers the draft. The House of Lords sought to require a "meaningful" vote (ie one which could have gone so far as to decide the UK should stay in the EU) but this was rejected during the passage through the UK Parliament of the European Union (Notification of Withdrawal) Act 2017. In practice, however, the UK Parliament can find a way to express a view not covered by the Government proposal.

Assuming the draft is approved by the UK Parliament and passes through the EU approval processes, it may need further ratification by the UK as a treaty and, depending on its terms, implementation with an appropriate UK law.

The EU On the EU side a withdrawal agreement under Article 50 requires approval of the European Parliament by a simple majority vote and approval of the Council by qualified majority vote (20 of the 27 Member States representing at least 65% of their combined population).

Framework for future trading relationship If the framework for a future trading relationship is set out separately from the withdrawal agreement, rather than included within it or annexed to it, it may require separate approval. It is not expected to be a fully-fledged trade agreement and might be dealt with relatively informally through an exchange of letters between the EU and the UK Government.

There would be detailed negotiations on the new relationship over a period of years on the basis of Articles 207, 217 and 218 TFEU after the UK had left the EU, and the parties would be likely to aim to complete this and bring the new arrangement into operation on the expiry of the implementation phase, so as to avoid abrupt changes and the associated costs.

The resulting Free Trade Agreement or Agreements would require approval of the Council by qualified majority and the consent of the European Parliament. If such an agreement is a “mixed” agreement dealing with matters that are in the shared or sole competence of the individual Member States, it would also require the approval of all the continuing Member States of the EU in accordance with their individual processes for treaty approval. This may sometimes require additional approvals, such as, in Belgium, the approval of its regions. In the UK it would go through the normal process for ratification and implementation of a Treaty, which includes both the royal prerogative act of ratification and the Treaty being laid before Parliament by order in Council and being subject to a negative resolution process (in which Parliament can reject, but cannot change the Treaty). Depending on its terms additional legislation may be required to implement the agreement.

IMPACT ON THE UNITY OF THE UNITED KINGDOM

The Scottish First Minister, Nicola Sturgeon, has announced that she wishes to hold a second referendum on Scottish independence from the UK between autumn 2018 and spring 2019 and has the support of the Scottish Parliament. Theresa May has indicated that she is not minded to consent to a second Scottish referendum until after Brexit, at a time when the options for the Scottish people are a lot clearer. A vote in favour of independence is something that would in any case greatly complicate the process of the UK establishing its position as a trading nation outside of the EU and would also cause difficulties for Scotland establishing a different course from the rest of the UK without any certainty of EU membership.

Following independence, if Scotland wished to form a close relationship with the EU, Scotland would need to either apply for membership of the EU if it wished to re-join or seek to join EFTA and then the EEA. The standard accession process for joining the EU requires a unanimity vote and ratification by all Member States, which can take several years and risks being vetoed by Spain, which for domestic reasons is strongly opposed to accommodating States that have seceded from larger States. Joining EFTA and the EEA requires the approval first of the four EFTA States (Norway, Iceland, Liechtenstein and Switzerland) and then of the EU 27 and the EFTA States (other than Switzerland), again on a unanimous basis.

The position is different for Northern Ireland should it opt for reunification. Under the terms of the Good Friday agreement the UK Government is legally obliged to offer Irish voters a referendum on reunification if polls show sufficient support for this to happen. In that event, Northern Ireland would be in a position of becoming part of an existing EU Member State, rather than seeking to join the EU as a new independent State (similar to the position when East Germany joined the EU in 1990 following German reunification).

The position of Wales in relation to Brexit is relatively uncomplicated. The majority of voters in Wales, like the English, voted to leave the EU. The Welsh Government has however stated that it wishes Wales and the UK as a whole to remain within the Single Market.

Where will all this take the UK? What outcomes does it face?

Once the Article 50 notice has been served, within the limitations of current UK policy, as set out in the Brexit White Paper, the range of outcomes are, broadly, reduced to two, but with variations possible:

- 2 A “hard Brexit” in which relations between the UK and the EU revert to those under WTO terms. If negotiations break down or the Article 50 agreement is rejected this could be a “cliff-edge”, moving overnight from full membership of the EU to WTO terms. There may still be a move to WTO terms even if there is an implementing agreement, which would merely soften the transition.
- 3 A move to a new trading relationship with an implementing agreement intended to bridge the gap. It is unclear whether the arrangements will cover both goods and services and there are a number of possible options with different effects for different businesses.

What should Businesses be doing?

It is evident that there is a real risk of a “hard Brexit” and this is the base case that many businesses will be examining, together with one or more other options, in order to devise a strategy to mitigate the potential negative effects of Brexit and maximise potential upsides. The focus of any Brexit review will of course depend on the nature of the businesses but will typically include a regulatory analysis (market access issues and deregulation opportunities), a supply chain analysis (impact of tariffs and non-tariff barriers) and a review of contracts (identifying problematical terms and contracting strategy issues).

This type of analysis will allow businesses to determine priorities for further action. This may involve engaging with government, directly or through industry bodies, to influence their approach based on prioritised analysis. At operational level it may mean strategic M&A, devising alternative legal structures, changes to geographical footprint and workforce, re-assessing investment plans, revising compliance frameworks and so on.

Given the evolutionary nature of the Brexit process any such monitoring should be on-going in order to sequence and trigger planned actions but also to continually re-validate adopted strategies.

Herbert Smith Freehills is working with numerous clients on the implications of Brexit for their activities. We have also collaborated extensively with other professional services organisations to provide holistic impact assessments and strategic advice, aligned with individual clients' objectives. Please contact your usual Herbert Smith Freehills contact or any of the contacts listed below if you would like to discuss further.

Contacts



Gavin Williams, Partner

T +44 20 7466 2153
M +44 7850 709435
Gavin.Williams@hsf.com



Lode Van Den Hende

T +32 2 518 1831
M +44 7809 200781
Lode.VanDenHende@hsf.com



Stephen Wilkinson, Partner

T +44 20 7466 2038
M +44 7785 775042
Stephen.Wilkinson@hsf.com



Eric White, Consultant

T +32 2 518 1826
M +44 7809 200980
Eric.White@hsf.com



Dorothy Livingston, Consultant

T +44 20 7466 2061
M +44 7785 254975
Dorothy.Livingston@hsf.com



Kristien Geurickx, Professional Support Lawyer

T +44 20 7466 2544
M +44 7595 967301
Kristien.Geurickx@hsf.com

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BANGKOK

Herbert Smith Freehills (Thailand) Ltd
T +66 2657 3888
F +66 2636 0657

BEIJING

Herbert Smith Freehills LLP Beijing
Representative Office (UK)
T +86 10 6535 5000
F +86 10 6535 5055

BELFAST

Herbert Smith Freehills LLP
T +44 28 9025 8200
F +44 28 9025 8201

BERLIN

Herbert Smith Freehills Germany LLP
T +49 30 2215 10400
F +49 30 2215 10499

BRISBANE

Herbert Smith Freehills
T +61 7 3258 6666
F +61 7 3258 6444

BRUSSELS

Herbert Smith Freehills LLP
T +32 2 511 7450
F +32 2 511 7772

DOHA

Herbert Smith Freehills Middle East LLP
T +974 4429 4000
F +974 4429 4001

DUBAI

Herbert Smith Freehills LLP
T +971 4 428 6300
F +971 4 365 3171

DÜSSELDORF

Herbert Smith Freehills Germany LLP
T +49 211 975 59000
F +49 211 975 59099

FRANKFURT

Herbert Smith Freehills Germany LLP
T +49 69 2222 82400
F +49 69 2222 82499

HONG KONG

Herbert Smith Freehills
T +852 2845 6639
F +852 2845 9099

JAKARTA

Hiswara Bunjamin and Tandjung
Herbert Smith Freehills LLP associated firm
T +62 21 574 4010
F +62 21 574 4670

JOHANNESBURG

Herbert Smith Freehills South Africa LLP
T +27 10 500 2600
F +27 11 327 6230

LONDON

Herbert Smith Freehills LLP
T +44 20 7374 8000
F +44 20 7374 0888

MADRID

Herbert Smith Freehills Spain LLP
T +34 91 423 4000
F +34 91 423 4001

MELBOURNE

Herbert Smith Freehills
T +61 3 9288 1234
F +61 3 9288 1567

MOSCOW

Herbert Smith Freehills CIS LLP
T +7 495 363 6500
F +7 495 363 6501

NEW YORK

Herbert Smith Freehills New York LLP
T +1 917 542 7600
F +1 917 542 7601

PARIS

Herbert Smith Freehills Paris LLP
T +33 1 53 57 70 70
F +33 1 53 57 70 80

PERTH

Herbert Smith Freehills
T +61 8 9211 7777
F +61 8 9211 7878

RIYADH

The Law Office of Nasser Al-Hamdan
Herbert Smith Freehills LLP associated firm
T +966 11 211 8120
F +966 11 211 8173

SEOUL

Herbert Smith Freehills LLP
Foreign Legal Consultant Office
T +82 2 6321 5600
F +82 2 6321 5601

SHANGHAI

Herbert Smith Freehills LLP Shanghai
Representative Office (UK)
T +86 21 2322 2000
F +86 21 2322 2322

SINGAPORE

Herbert Smith Freehills LLP
T +65 6868 8000
F +65 6868 8001

SYDNEY

Herbert Smith Freehills
T +61 2 9225 5000
F +61 2 9322 4000

TOKYO

Herbert Smith Freehills
T +81 3 5412 5412
F +81 3 5412 5413